No. 1499

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COE D. BARNARD

PLAINTIFF IN ERROR

VS.

THE UNITED STATES OF AMERICA

DEFENDANT IN ERROR

Brief for Defendant in Error

Upon Writ of Error to the United States Circuit Court for the District of Oregon

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Upon Writ of Error to the United States Circuit Court for the District of Oregon.

HISTORY OF THE CASE

The plaintiff in error, who will hereinafter be called "the defendant," was indicted by the Grand Jury of the Circuit Court for the District of Oregon on the 8th day of April, 1905, for the crime of perjury in having wilfully, corruptly and falsely deposed and sworn before James S. Stewart, a United States Commissioner for the District of Oregon, to certain testimony constituting part of the final proof in support of a homestead entry of one Charles A. Watson. The materiality of the testimony is duly alleged and the testimony itself is set forth in full in the indictment.

(Trans. of Rec., pages 8 to 16.)

On the 12th of April, 1905, the defendant filed a plea in abatement (Trans. of Rec., pages 18 to 24). It was stipulated that certain objections which had been theretofore filed in another case be deemed and treated as offered in support of the objections to the plea in abatement in this case, and that the same proceedings, rulings, objections and exceptions that were made and had before the Court in said case, etc., be deemed, considered and treated as having occurred upon the hearing of the plea in abatement in this case.

(Trans. of Rec., pp. 25 and 26.)

This plea in abatement was overruled, and as no specification of error has been made or argued in reference to this plea it will hereafter be disregarded.

On April 27, 1905, the defendant demurred to the indictment on the ground:

"That said indictment and the matter and facts stated "therein in manner and form as the same are so stated "and set forth in the indictment, are not sufficient in law, "and that the facts stated in said indictment are not suf- "ficient to constitute a crime."

(Trans. of Rec., p. 27.)

Thereafter, on the 10th day of July, 1905, at a term of said Circuit Court presided over by Hon. John J. De-Haven, United States District Judge, this demurrer was overruled.

(Trans. of Rec., page 32.)

On September 28, 1905, the defendant entered his plea of not guilty to the indictment.

(Trans. of Rec., page 33.)

Thereafter, beginning on August 8, 1906, at a term of said Circuit Court presided over by the Hon. William H. Hunt, United States District Judge, the trial of the defendant upon said indictment was begun and a jury empaneled, and such further proceedings had that on the 11th day of August, 1906, the defendant was found guilty of the crime charged in the indictment, with a recommendation to the clemency of the Court, and on the 18th day of August, a motion in arrest of judgment having been made and argued by counsel and having been denied, the defendant was sentenced to imprisonment at hard labor at the United States penitentiary at McNeil's Island, Washington, and to pay a fine of $2,000.00.

(Trans. of Rec., pages 35 to 43.)

Thereafter, and on the 15th day of February, 1907, the defendant filed a petition for writ of error, with the usual supersedeas bond, and an order was entered allowing said writ.

(Trans. of Rec., pages 44 to 78.)

Thereafter, and on May 3, 1907, the bill of exceptions which constitutes the record in this case was duly made, settled and filed.

It will be noted that this bill of exceptions not only does not purport to contain and set forth all of the evidence given on behalf of the government on the trial, but at page 175 it contains this specific statement:

"There was other testimony given by the witnesses "Coombs, Scoggin, King, Parker and Kennedy, tending "to corroborate the other witnesses for the Government "and tending to show the facts stated in the indictment."

The allegations or assignments of error, and points raised and argued by counsel for the defendant in error, will now be considered *seriatim*.

ARGUMENT

POINT I.

The demurrer to the indictment was properly overruled.

The claim of the demurrer, and of the argument of counsel for plaintiff in error in support of it, seems to be, that the United States Commissioner before whom the testimony of Barnard which was alleged to be perjured testimony was taken, was not specifically alleged in the indictment to have had authority to administer "that particular oath" or take "that particular proof" at the time it was taken, and that it was not, in the alternative of this, alleged in the indictment that there were certain preliminary facts which would give the Commissioner authority to take that particular proof and to show that the testimony in question was material to the proof.

(See Brief of Plaintiff in Error, page 18 et seq.)

The point of the argument made in this behalf is embodied in the statement at pages 21 and 22 of the Brief for Plaintiff in Error, that:

"It will be found by an examination of the authorities "that it is usual to allege directly that the officer had "authority to 'administer said oath,' but here there was "no such allegation as is required at common law, show-"ing that the steps had been taken to give such authority.

"It is perfectly clear under the authorities that one "of these two methods must be followed, and the pleader "must either follow the statute and allege directly that "the officer had authority to administer the particular

"oath in question, or the alternative common law pro-
"ceeding and allege (in such cases as this) that the proper
"notice had been given, posted, etc., and the preliminary
"requirements attended to, which would give the commis-
"sioner authority to so administer the oath."

Citing,

2 Bishop's New Cr. Pro., Sec. 901 and 914.

Wharton's Cr. Law (8th ed.), Sec. 1290-91.

The counsel admit, for such is the case, that the indictment contains a general allegation that the Commissioner was an officer authorized by law to administer such oaths, but contends that that was a mere allegation of general authority and that, inasmuch as the final proofs to a homestead entry could not be made until certain notices had been filed and published, the indictment should have contained an allegation, either that the United States Commissioner was duly authorized to administer "this particular oath," or that the notices, etc., had been published.

Turning now to the indictment, we find that it contains the following allegation as to the authority of the Commissioner:

"That on the twenty-third day of June, in the year of
"our Lord nineteen hundred and four, Coe D. Barnard,
"late of the County of Wheeler, in the State and District
"of Oregon, at and within the said County of Wheeler,
"in the district aforesaid, came in person before James
"S. Stewart, who was then and there the duly appointed,
"qualified and acting United States Commissioner for the
"District of Oregon, and who was then and there an
"officer, who was authorized by the laws of the United

"States to administer an oath and to take the testimony "of witnesses in the matter of the application of a claim- "ant to make final proof upon a homestead entry of public "lands of the United States lying within The Dalles land "district of the United States in the said District of Ore- "gon, and that the said James S. Stewart, as such United "States Commissioner for the District of Oregon, was "then and there engaged in taking and hearing testimony "in the matter of the application of Charles A. Watson, "late of said District of Oregon, to make final proof in "support of his homestead entry for—"
certain lands, describing them.

Then follow the proper allegations as to the administering of the oath, the materiality of the testimony and the testimony itself, which is set out in full, and concluding with the following allegation:

"And so the grand jurors aforesaid, upon their oath "aforesaid, do say that the said Coe D. Barnard, in man- "ner and form aforesaid, in and by his said testimony, "and upon his oath aforesaid, in a case in which the law "of the said United States authorized an oath to be "administered, unlawfully did wilfully, and contrary to "his said oath, state and subscribe material matters, which "he did not then believe to be true, and thereby did com- "mit wilful and corrupt perjury," etc.

(Indictment, Trans. of Rec., page 15.)

Counsel for plaintiff in error seem to have omitted or evaded calling the attention of the Court to this portion of the indictment just quoted. We insist that if there is any merit whatever deserving of consideration in the point made against the indictment by the demurrer it

is entirely overcome by the two allegations of the indictment which we have quoted, namely, first, the allegation of the general authority of the United States Commissioner "to administer an oath and to take the testimony "of witnesses in the matter of the application of a claim-"ant to make final proof upon a homestead entry of public "lands," etc., followed by the allegation that the said United States Commissioner "was then and there engaged "in taking and hearing testimony in the matter of the "application of Charles A. Watson, late of said District "of Oregon, to make final proof in support of his home-"stead entry," and closing with the allegation that this was a case "in which a law of the said United States "authorized an oath to be administered."

We assert that directly the converse of the proposition put forth by counsel for plaintiff in error is the true state of the law, both upon principle and upon authority. That is to say, where there is a general allegation of general authority conferred by law upon an officer to administer an oath it is never necessary to set out that he had particular authority to administer the particular oath in question, provided, of course, the indictment contains, as this one does, the allegations showing the pendency of the proceeding and materiality of the testimony in which the oath was taken.

Counsel for plaintiff in error do not cite any specific decisions of any courts, but the general enunciations of the well-known text books Wharton and Bishop, which on being examined will clearly disclose that these writers merely enunciate the well-known and general principle

that where an officer only gains the authority to administer an oath and take testimony in a special case by virtue of the particular facts of the case itself and has no general authority to administer oaths, in all such cases the particular fact should be set forth giving the jurisdiction and authority; which is very far from being the situation here. In the case at bar it is quite true that the applicant Watson, to whose final proof the plaintiff in error was giving support by his testimony, was not entitled to make such final proof and have his application allowed until the notices had been prepared and published in the manner required by the Act of March 3, 1879, Chapter 192, which is quoted in the brief for plaintiff in error at pages 19 and 20. But the indictment does contain an allegation that Commissioner Stewart was authorized to administer an oath and take the testimony of witnesses in the matter of the application of a claimant to make final proof and that he was engaged in taking and hearing testimony in the matter of the application of Watson to make final proof, and that Barnard subscribed and swore to his written testimony, which is set out in full, as true, and that such testimony was material, as the statute provides that such testimony shall be given in support of such application and before the application can be granted.

Further argument on this point seems unnecessary. It seems to fall precisely within the provisions of the U. S. Revised Statutes, section 1025, that after verdict no indictment shall be deemed insufficient for any defect which shall not tend to the prejudice of the defendant,

and the authorities construing and applying that section, some of which are:

Rev. St. U. S., Sec. 1025;
United States v. Rhoades, 30 Fed. 431, 434;
United States v. Chase, 27 Fed. 807;
Connors v. United States, 158 U. S. 408, 411;
Price v. United States, 165 U. S. 311, 315;
Wright v. United States, 108 Fed. 805, 810;
United States v. Dimmick, 112 Fed. 352, 354.

Whatever defects then exist not consisting in the *total want* of essential averments are cured after verdict; and if the indictment read in the light of ordinary understanding and intelligence apprises the defendant of the charge against him, it is sufficient.

Markham v. United States, 160 U. S. 319, at p. 325;
Lehman v. United States, 127 Fed., pp. 47 and 48;
Evans v. United States, 153 U. S. 584;
United States v. Eddy, 134 Fed. 114, 116, 117.

POINT II.

The objections and exception taken by the plaintiff in error to the admission of the evidence given by Putnam of the oral statements made by one Watson tending to show that Watson had not resided upon the land described in his homestead entry were not well taken.

The first ruling on this point is found at page 82 of the record. The question there put and objected to was as follows (testimony of E. A. Putnam):

"Q. State whether or not there was anything in that "conversation that showed or tended to show where Wat-

"son had been about that time or immediately preced-
"ing it?

"To which the defendant objected as incompetent and "not in any way binding upon the defendant in this cause "and as hearsay and as not the best evidence, but the "objection was overruled and the defendant excepted;

"The Court saying: 'It is understood the question is " 'admitted solely as bearing upon the question as to " 'whether or not Watson did state the truth in regard " 'to the answers that he made in making his proof.'

"Whereupon the witness answered, 'He said he had " 'his foot cut at the time—he said he had been working " 'on the Columbia River, down about St. Helens, some- " 'where, and said he was going home, and going out to " 'where his folks lived.'

"Q. Did he say where that was?

"Same objection, ruling and exception.

"A. Yes, sir; out towards Forest Grove, out in Wash- "ington County.

"Q. What was the logging camp, did he state?

"Same objection, ruling and exception.

"A. It was somewheres about St. Helens, somewhere "down about in there, I think it was."

It further appears in the record (page 83) that said Charles A. Watson had not been called or testified as a witness in said cause and did not testify as a witness therein. It also appeared that this conversation between the witness Putnam and the said Watson occurred at Portland, Oregon, at the Merchants Hotel, about the 28th of April, 1903.

(Trans. of Rec., page 81, and see expressly page 150, where exhibit date is given as April 28, 1903.

Watson was the man as to whose final proof in support of his homestead entry the plaintiff in error, Barnard, gave the testimony which constituted the perjury alleged in the indictment.

The argument on the part of the defendant is that this testimony of Putnam as to what Watson told him as to where he had been and what he had been doing and where he was going was purely hearsay evidence. In support of this argument the counsel for plaintiff in error cite cases in Wyoming, Ohio, Massachusetts, Mississippi, Nevada, Oregon, Alabama, California and Georgia, excerpts from some of which are printed in their brief, and which undoubtedly declare the well-known general rule that hearsay evidence to prove a fact is not admissible except when the testimony of the person whose statements are being proved cannot be obtained, such as, for instance, the cases specified by counsel for plaintiff in error at page 27 of the brief, viz: that the person in question was dead or out of the state.

None of these cases, however, as a very cursory examination will disclose, go so far as to exclude the declarations of a person as to his place of residence when that place of residence at a given time is one of the issues involved in the trial. Reasoning about this class of evidence from the standpoint of principle, it appears at once that as residence is partly a matter of actual occupancy and partly a matter of intention of the occupant of a particular place, his declarations are the very best kind of evidence as to his intentions. And when we come to examine the authorities we find that they follow this line of reasoning and that there is abundant authority to sus-

tain the evidence, concerning the admission of which error is claimed by the counsel for the plaintiff in error.

In

McDowell v. Goldsmith, 6 Md. Reports 329,

quoted and followed in

Curtis v. More, 20 Md. 93,

the Court said:

"Where it is necessary in the course of a cause to inquire into a particular act and the intention of the persons who did the act, proof of what the person said at the time of doing it is admissible for the purpose of showing its true character."

In

Shailer v. Bumstead, 99 Mass. 120,

which was cited with approval by the United States Circuit Court of Appeals for the Ninth Circuit in the case of

In re San Raphael, 141 Fed. 279,

more fully referred to below, the Circuit Court of Massachusetts said:

"Intention, purpose, mental peculiarity and conditions are mainly ascertainable through the medium offered by language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct."

So also in

Inhabitants of Knox v. Montville, 98 Maine 493,

the Supreme Court of Maine held, though carefully guarding the extent to which such declarations should be permitted, that declarations of a pauper as to his intentions concerning his residence were admissible.

In

Grisseza v. Terwilliger, 77 Pac. Rep. 1034,

a California case, the California Supreme Court held that the declarations of a person that he had no title or interest in an irrigation ditch was admissible to show that he had abandoned said ditch.

And in

Johnson v. Cole, 178 N. Y. 364,

and many kindred cases, the declarations of a person when delivering a certificate of deposit to another person were held admissible to show whether he was acting in his own behalf or as agent for his wife.

And see also

Wright v. Stewart, 130 Fed. 905, 915;

Brown v. United States, 142 Fed. 1;

Insurance Co. v. Moseley, 8 Wall (U. S.) 397.

And

Mutual Life Ins. Co. v. Hillman, 145 U. S. 285,

in which case the authorities bearing upon the admissibility of declarations showing intention and purpose are quite fully collated.

In the recent case of

In re San Raphael, 141 Fed. 271-279,

the United States Circuit Court of Appeals for the Ninth Circuit, in an opinion per Ross, J., quoted and followed the opinion of the Supreme Court of the United States in the case of Mutual Life Insurance Company v. Hillman as follows:

"Whenever the intention is of itself a distinct and "material fact in a chain of circumstances it may be proved "by the contemporaneous oral or written declarations of

"a party. The existence of a particular intention in a "certain person at a certain time being a material fact "to be proved, evidence that he expressed that intention "at that time is as direct evidence of the fact as his own "testimony that he had that intention would be."

And see also the authorities collected in Volume 20 of the Century Digest, title "Evidence," Sections 1063 and 1064.

On examination of the record in the case at bar it appears clearly that the declarations of the witness Putnam, and later of the witness Shephard, which were objected to, solely related and were strictly limited by the Court to proving what the intentions of Watson were as to his maintaining his residence on a certain place or going away from or going to another place. Thus at page 82 of the record, which we have quoted above, the witness Putnam was allowed to state that Watson told him when he saw him at Portland that he, Watson, "Had "his foot cut at the time—he said he had been working "on the Columbia River, down about St. Helens, some-"where, and said he was going home, and going out to "where his folks lived—out towards Forest Grove, out in "Washington County. It was somewheres about St. "Helens, somewhere down about in there, I think it was."

And later on the witness Shephard was allowed to testify that Watson told him that he, Watson, had run off some horses from up near where the land in question was and that the settlers up there did not want him to come back, or that in substance.

We respectfully submit that the testimony as to Watson's declarations was strictly proper and admissible, with

the limitations imposed upon it by the Court, solely for the purpose of showing by those declarations, as it had been theretofore shown by other evidence in the case (and it must be presumed by the Court to have been conclusively so shown because the record does not purport to contain all the evidence, and does contain the statement at page 175, quoted earlier in this brief, that there was other testimony "tending to corroborate the other wit-"nesses for the government and tending to show the facts "stated in the indictment"), that Watson in fact did not reside the necessary length of time required by law on his homestead entry land, and that both the affidavit of Watson as to such residence and the affidavit of the defendant Barnard as his witness to continuous residence from 1898 to 1904 were false. Therefore we conclude that no prejudicial error was committed by the admission of Putnam's evidence as to Watson's declarations.

POINT III.

The objection and exception taken by the plaintiff in error to the testimony of Shephard as to the declarations and statements of Watson as to his residence were not well taken.

This is so for the reason stated in the foregoing point. We make a separate point as to it here simply because some question is raised by counsel for plaintiff in error at pages 30 and 33 of their brief that the testimony of Shephard was offered not only for the purpose of proving Watson's declarations and intentions as to his residence, but also, as claimed, "for the purpose of directly besmirch-"ing the defendant and of raising the intimation that he, "with others, was implicated with the claimant in horse "stealing, and had hired him to run off horses."

The testimony of Shephard and the objections thereto and the rulings of the Court thereon appear at pages 83 and 84 of the Transcript of the Record. From this it appears that the witness saw Charles A. Watson around Mountaindale in 1902, that Watson was there about two weeks hauling timber in June or July, that it was after the third of July that he saw Watson working for one Hollenbeck, and that he saw Watson running a saloon at Greenville in 1901, seven or eight miles from Mountaindale, that he, the witness, landed there about the 21st of June with some horses and returned there about the 25th of July, that he saw Watson there about that time three or four times, pretty nearly every day he would go to Greenville with a horse and team, that Watson was running the saloon alone himself, and that he had talked with Watson at that time.

Whereupon the following question was asked him:

"Q. And did he state at that time, or in connection "with that same matter, while you were conversing, the "reason why he didn't go back to it?"

To this the defendant objected on the same grounds as to the testimony of Putnam, as hereinbefore stated, but the objection was overruled and the defendant excepted.

Whereupon the witness answered:

"Well, he asked me how it would be for him to go "back there, and I answered, if you are making a good "living here and trying to be honest you had better stay "where you are.

"Q. What was the rest of the conversation, if any?"

Same objection, ruling and exception.

"A. Well, it was about the horses he brought down. "I asked him what prices he got for them, and so on."

The Court will note that the first question which called for the conversations with Watson simply called for the statement which Watson had made to the witness Shephard as to why he did not go back to his homestead entry, and that the witness had simply stated that Watson asked him how it would be for him to go back there. The Court will also note that the next question, "What was the rest of the conversation, if any?" must necessarily have referred to this same conversation and to the same matter that was called for by the first question, which related solely as to what Watson stated as to his reason why he did not go back to his homestead entry. To this second question, "What was the rest of the conversation, if any?" the same objection was made as to the testimony given by Putnam as to the conversation with Watson, and if that testimony was proper it certainly was proper to ask the question of Shephard. It appears, however, that when Shephard answered the question he stated, "Well, it was "about the horses he brought down. I asked him what "prices he got for them, and so on." He was then asked, without objection:

"Q. Horses he had where?

"A. Horses he fetched down in 1901.

"Q. In 1901 or 1902? A. In 1899.

"Q. What horses were they?

"A. They were the horses he got of Mr. Barnard.

"Q. This same defendant? A. Yes, sir.

"Q. Just tell the jury about that, please.

"A. About the horses?

"Q. Yes; just what you know; not what anybody told "you; state the facts.

"A. Well, he was working for Barnard and got those "horses and brought them down here to sell; there were "seventeen head of them passed through the gate, going "down the hill to my brother's ranch.

"Q. When was that?

"A. July, about the 17th, in the year 1899. These "horses were at Mr. Barnard's at the time; I counted "them as they went by; I know they were Barnard's "horses because I had seen him riding around there break-"ing them, riding them around the range and gathering "up the horses—he fetched the horses to Greenville, at "least that is what he said; he might have sold some along "the road or traded them off for something.

"Q. Was there anything said in any of the conversa-"tions you had—did you converse with Watson about that "time?"

It will be observed, therefore, that defendant's counsel sat by and permitted the witness to answer the question as to what the rest of the conversation was, that it was about horses he brought down, and all the other questions as to where the horses came from and what he saw about them, without the slightest objection or intimation of any claim at that time that there was anything in this testimony about the horses that was objectionable, except the objection that he had made to the testimony of Putnam, which was a general objection to any testimony as to declarations of Watson as hearsay.

At page 86 of the record the question was asked:

"What was the fact about their saying anything at "that time about the ranch?"

To this objection was made as incompetent and not in any way bearing upon the defendant, and hearsay. The objection was overruled and the defendant excepted.

Whereupon the witness answered:

"He said he wanted to go back and prove up.

"Q. Did he say why?"

Same objection, ruling and exception.

"A. He said parties wanted him to go back and "prove up.

"Q. Did he say why?"

Same objection, ruling and exception.

"A. He said parties wanted him to go back.

"Q. Whom did he say wanted him to go back?"

Same objection, ruling and exception.

"A. He had reference to Mr. Hendricks.

"Q. Did he give you any reason as to why he would "not go back?"

Same objection, ruling and exception.

"A. He didn't think people wanted him, I guess.

"Q. Didn't he tell you why?"

Same objection, ruling and exception.

"A. No, he didn't tell me exactly.

"Q. Did he give you any reason why?"

Same objection, ruling and exception.

"A. Well, all the reason was that there were some "horses run off that spring and he was hired to do it and "he didn't suppose the settlers wanted him to go back."

Whereupon the counsel for the defendant moved to strike out the conversation on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the Court asked the witness:

"The conversation was all with Watson?

"A. Yes, sir.

"THE COURT: Its relevancy may be as to the bearing "on the question of residence upon the claim by Watson."

Whereupon the Court ruled that for that purpose it was competent, and the defendant excepted and the exception was allowed.

We respectfully submit that the criticism made by counsel for plaintiff in error that there was anything in this testimony of Shephard that tended to besmirch the defendant and raise the intimation that he, with others, was implicated with the claimant Watson in horse stealing, and that he had hired him to run off horses, is wholly unfounded by the facts of the case as disclosed by the record. The testimony which related to Watson's declarations as to Barnard (the defendant) was clearly innocent of any such inference and simply tended to show that the claimant Watson had been bringing horses down which belonged to Barnard, and for all that appears, they were being brought down for perfectly legitimate purposes, at a certain time in June, 1901, which, according to the proofs sworn to by Watson and concerning which the defendant below, Barnard, gave testimony which is alleged to be perjured, was the time during which Barnard had testified that Watson had an established and continuous residence on the homestead in question.

Thus Question 5 in the homestead entry was as follows:

"When did claimant settle upon the homestead, and "at what date did he establish actual residence thereon?

"Ans. In the spring of 1898; established residence at "the same time.

"Ques. 6. Have claimant and family resided continu- "ously on the homestead since first establishing residence "thereon?

"Ans. Yes, except as stated below. He is unmarried. "I live about eight miles from settler's place. In riding "for my stock I frequently ride past his place and stop "at his house.

"Ques. 7. For what period or periods has the settler "been absent from the land since making settlement, and "for what purpose; and if temporarily absent, did claim- "ant's family reside upon and cultivate the land during "such absence?

"Ans. He made a trip to the Willamette Valley in "July, 1902, for the benefit of his health, and returned in "October, 1902."

Thus it appears that the defendant below had testified positively that Watson resided continuously on the homestead entry since 1898, excepting a trip to the Willamette Valley in July, 1902, for the benefit of his health. Consequently it was material and proper to show Watson's whereabouts and his actions at any time from 1898 down to the time homestead proof was made, viz., June 23, 1904.

The further testimony of the witness Shephard as to the reason which Watson gave why he did not want to go back had a proper tendency as bearing upon Watson's intention as to his residence. It is respectfully urged that if, as Watson told Shephard, "There were some "horses run off that spring (1901) and he was hired to "do it, and he didn't suppose the settlers wanted him to

"go back," these facts, or the statement of Watson that they were facts, go very far to prove that he never did have any continuous residence on the homestead in question, and that there were very good and sufficient reasons why he could not have such residence, namely, that he had run off some horses and that the settlers did not want him to go back. It was much stronger evidence as to the state of his mind and his intentions with regard to his residence than could ordinarily be given in any case that could be imagined. The chimerical theory now evolved from the inner consciousness of the counsel for plaintiff in error, that this testimony tended to besmirch the character of his client, is absolutely untenable when examined in the light of the cold type of the record. It even warrants the suspicion that some such transaction between the defendant and the man Watson did take place, and that the knowledge of this fact has now caused the upbuilding of the theory as to the purport and effect of the testimony of the witness Shephard. There is certainly nothing in the record itself to support any such assumption or claim. This testimony of Shephard must stand or fall, then, upon the same basis of legal rules of evidence as the testimony of Putnam. If that testimony as to declarations made by Watson to him as to Watson's residence and his intentions with respect thereto are admissible, then clearly the testimony of Shephard was also so admissible, and the objections and exceptions thereto do not constitute reversible error.

POINT IV.

It was not error to admit evidence of other alleged perjuries of the same general character and description, namely, in con-

nection with fraudulent homestead entries committed by the defendant Barnard.

The argument and brief of counsel for plaintiff in error cites a large number of authorities and quotes from some of them in reference to this proposition, but he destroys the whole effect of them by the tacit admission contained in the heading of his point on this proposition at page 33 of his brief that such evidence is admissible when it does tend in some way to show knowledge, design or system.

The very essence of the crime of perjury is a corrupt and wilful intent to falsely swear. If there is any class of cases in which the commission of other similar offenses can be proved to show a wrongful and corrupt intent perjury falls within that class. We do not think it necessary to spend any time upon the consideration or an argument of this alleged error, because this Court has considered the whole matter fully and determined it against the contention of counsel for plaintiff in error in the case of

Gesner v. United States, 153 Fed. 46,

in which the celebrated case of

People v. Mollineaux, 168 N. Y. 264,

which contains the most elaborate review of the authorities on this subject that has perhaps ever been attempted, is cited with approval. This Gesner case has been affirmed on this point by the Supreme Court of the United States, in

Williamson v. United States, not yet reported.

POINT V.

It was not error for the Court to permit the prosecution to cross-examine the character witness Stewart on behalf of the defendant as to particular acts of alleged wrongdoing.

It appears that the witness James Stewart, who was the United States Commissioner who was alleged in the indictment and proved at the trial to have administered the oath and taken the false testimony of the defendant Barnard in question in the case at bar, was called by Barnard as a witness to his general reputation for truth and veracity, and under the objection and exception of the counsel for the defendant the prosecuting attorney was allowed to cross-examine this witness Stewart as to whether the defendant had made final proof before him, Stewart, for his own homestead. The particular matter alleged as error by counsel for plaintiff in error is set forth at pages 109 to 112, and also more fully at pages 175 to 181 of the record, from which it would seem that the witness Stewart was shown a paper and asked whether he had ever seen it before, to which he replied that it was Coe Barnard's final proof for a homestead that he had proved up on before Stewart, and he was then asked the question, "What homestead, do you know?" This question was objected to by defendant's counsel as not proper cross-examination, as incompetent and immaterial and irrelevant, whereupon the Court asked the District Attorney, "What do you propose to show?" and Mr. Bristol for the Government stated, "I propose to show matter affect-
"ing the truth and veracity of the defendant Coe Barnard,
"nothing more or nothing less."

"THE COURT: Can you show this by a specific in-
"stance?

"A. I propose to show by this witness that Coe D.
"Barnard, before this witness as a United States Com-
"missioner, swore to the fact that he had continuously
"resided on a homestead other than the place he did
"reside."

And thereupon the Government asked that the ruling upon the question be postponed until after adjournment for lunch, and when the Court had reconvened, the Court overruled the objection, to which ruling of the Court the defendant by his counsel then and there in open Court excepted, and thereupon the witness testified:

"A. The homestead described here" (indicating the final proof which had been shown him).

Thereupon the following question was asked:

"Q. What is the fact, Mr. Stewart, what is the fact
"as to whether or not you have heard or know whether
"Coe D. Barnard, on or about the 23d day of June, 1905,
"before you as United States Commissioner, gave any
"testimony under oath then in the matter before you."

Whereupon the defendant objected to that part of the question in which the witness is asked to state as to what he knows of his own knowledge, but the objection was overruled and the defendant excepted and his exception was allowed, and thereupon the final proof paper which had been shown to the witness was offered in evidence. It is printed in full at pages 57 to 68 of of the record.

It is true that the counsel for the Government did at first state, as shown by the quotation from the record above, that the purpose of this evidence was to affect the

truth and veracity of the defendant Coe Barnard, but whatever he may have said at that time, he expressly limited it later (see pp. 176, 177) to showing that the witness Stewart had knowledge that should have "entered "into his estimate of the truth and veracity of the person "inquired about," and when the Court came to charge the jury it closely limited the effect of this testimony, as follows:

(See Trans. of Rec., page 135.)

"You will remember also that today the United States "Commissioner testified as to the reputation of the defend- "ant for truth and veracity in the community in which he "lived. Upon cross-examination there was a proof which "had been made by the defendant upon certain land other "than that upon which it is contended he made his home "for a long time. The applicability of this is limited to "the question of the credibility of the witness Stewart in "his testimony which he gave as to the reputation of the "defendant, that is, it is offered for the purpose of affect- "ing the credibility of the statements made by the witness "Stewart."

While it is probably true, as stated by counsel for the plaintiff in error and in the authorities which he cites and quotes, that evidence of specific acts of a defendant is not admissible as tending to destroy his reputation for truth and veracity, it has never yet been held that a character witness who testifies to his knowledge of the reputation of a defendant may not be asked as to some acts in which he himself participated, whether in connection with the defendant or others, which tend to destroy the credibility of the character witness himself.

Hence, limited as the effect of the testimony was by the charge of the Court, it certainly was proper evidence. Indeed, similar evidence was held to be admissible in Davis v. the United States, 107 Fed. 753, 757, 758.

In this case (Davis v. United States), it appears the district attorney asked a question on cross-examination of one of the defendant's witnesses in reference to an occurrence at the session of the District Court in 1905. This question was as follows:

"Was not that the same time George Davis was sent up?"

To which the witness answered:

"It was."

The Court, on page 758, after considering the question as to whether an exception had been properly taken to this question, said:

"But if we assume the rule to be, as modified by the "exception, it remains that the evidence was of a fact "bearing upon the question of the character of the defend- "ant *which was put in issue by his tendering evidence that "it was good,* and that the evidence related to a period con- "tinuing to the time of the trial."

Thus it will be seen that the Circuit Court of Appeals permitted the question, above mentioned, to be asked of the witness on cross-examination because the defendant had tendered evidence that his character was good, and also that the evidence thus allowed related not to what the witness had heard as to the character of the defendant, but as to a specific occurrence, which was that the defendant had been sent up to the penitentiary at a certain time.

In Commonwealth v. O'Brien, 119 Mass. 342, s. c. 20

Am. Rep. 325, the Supreme Court of Massachusetts cites and quotes from the deliverance of Chief Justice Cockburn, in the celebrated case of Regina v. Rowton, Leigh and Cave C. C. 520; s. c. 10 Cox's C. C. 25; upon the proposition that as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description showing that the evidence which has been given in favor of the prisoner is not the truth, and that the man's general reputation is bad, and then proceeds as follows:

"It is true that upon cross-examination of a witness, "testifying to general reputation, questions may be put "to show the sources of his information, and particular "facts may be called to the witness' attention, and he may "be asked if he ever heard of them; but this is allowed, "not for the purpose of establishing the truth of these "facts, *but to test the credibility of the witness, and to "ascertain what weight or value is to be given to his testi-"mony.*"

In Basye v. State, 63 N. W. Rep. 811, 818, 819, the Supreme Court of Nebraska, in a well considered opinion, used this language:

"While particular facts are inadmissible in evidence "upon *direct* examination for the purpose of sustaining or "overthrowing character, yet this doctrine does not extend "to *cross-examination.* It is firmly settled by the adjudi-"cations in this country that, upon cross-examination of "a witness who has testified to general reputation, ques-"tions may be propounded for the purpose of eliciting the "source of the witness' information, and particular facts "may be called to his attention, and he be asked whether

"he ever heard them. This is permissible, not for the pur-
"pose of establishing the truth of such facts, but *to test*
"*the witness' credibility,* and to enable the jury to ascer-
"tain the weight to be given to his testimony. The extent
"of the cross-examination of a witness must be left to the
"discretion of the trial court."

Citing numerous cases.

Again, in Randall v. State, 32 N. E. Rep. 305, 306, an Indiana case, a character witness was asked several questions as to what he had heard as to the defendant having been accused of other offenses and arrested in any other county on the charge of malicious trespass. The witness was allowed to answer this question to the effect that he had learned that the accused had been convicted and imprisoned for shooting a turkey; the Court said:

"The witness having testified to a knowledge of the
"character of the accused, and that it was good, it was
"proper by a cross-examination to develop the extent of
"his knowledge of his character and the facts upon which
"his opinion was based. That the jury might properly
"weigh his estimate of character, it was right *that they be*
"*fully informed of the facts within the knowledge of the*
"*witness* which led him to the formation of that estimate.
"The extent to which the cross-examination might be car-
"ried rested largely in the discretion of the trial court.
"We cannot say that there was such abuse of that discre-
"tion as would justify a reversal. McDonel v. State, 90
"Ind. 320; Wachstetter v. State, 99 Ind. 290. *A cross-*
"*examination of a witness under such circumstances is in*
"*the nature of a trial of the witness.* The facts thus devel-
"oped had no bearing on the question of the guilt or inno-

"cence of the accused, save as they may have tended to "shake or sustain the credibility of the witness, or to "weaken or strengthen his estimate of the character of the "accused."

And see also

Le Beau v. People, 34 N. Y. 223, 234;

Real v. People, 42 N. Y. 270;

Davis v. Coblenz, 174 U. S. 727.

And Wigmore on Evidence, at the very place cited by counsel for plaintiff in error (Vol. 2, page 1144), goes on further in his philosophical method of discussing the rules of evidence, to seriously question the wisdom of the rule which has so long prevailed and which is apparently established, by which the cross-examining counsel is permitted, in the guise of asking a witness whether he has heard of various acts of wrong doing on the part of the defendant, as permitting that to be done indirectly which is forbidden to be done directly, that is, bringing into the case specific acts which the defendant has no opportunity to disprove. However interesting or well founded this criticism may be it certainly serves to raise the query as to whether in such a case as the case at bar, where the very witness upon the stand testifying as to good character, is the official before whom the defendant himself had committed the perjury for which he was being tried, it would not be well, and is not entirely proper, to go sharply to the crediblity of the witness and public officer by calling to his attention the fact that to his own knowledge the defendant had sworn falsely in another matter before him.

The Court will also note that it appears from the homestead entry proofs set forth in the indictment, and

from the homestead entry proofs of the defendant Barnard himself in support of his own homestead entry, the admission of which, in connection with the testimony of the witness Stewart, is claimed to be erroneous, that the officer, namely this same character witness Stewart before whom the testimony is taken, is required to call the attention of the witness to the section of the United States revised statutes relating to perjury and to state to him that it is the purpose of the Government to find out if he testified falsely, and to prosecute him to the full extent of the law. (See Record, pp. 61 and 203).

We have, then, in the case at bar, an officer of the United States Government, sworn to perform his duty as such and duly notified that he must warn the witness against perjury, coming on the stand and testifying to having taken false oath of the very man whose character he was testifying was good.

We have searched the books in vain to find a case just like this where the proof shows that the particular act proved was an act in which the witness himself participated. Surely if there ever was a case in which there should be partial exception to the general rule forbidding proof of specific acts, this was such a case, and within the spirit if not the full and complete declarations of the authorities above quoted, it would seem that such cross-examination was not erroneous when limited, as it was, by both the Government and the Court itself in its charge to its true bearing on the credibility of the character witness.

This goes to the question of the interest of the witness in testifying in defendant's favor. If the witness could

by testifying to Barnard's good character secure his acquittal, it might shield the witness from the exposure or consequences of his own misconduct. If the witness had been associated with the defendant in the commission of a similar crime, the jury were entitled to know this fact to enable them to properly weigh the testimony of the witness, as well as to show intent of defendant in committing the crime for which he was being tried, as we have fully argued in another paragraph of this point.

But if any error was committed in this respect, which we deny, the testimony of this witness as to the final proof made by Coe Barnard before him on his own homestead could not have done any harm, because on the redirect examination of the witness Stewart by counsel for Barnard he testified that he did not know anything about Barnard's living on his homestead claim that he proved up on before the witness except what he swore to in his proof, and he was asked the specific question, "Do you "know anything as to whether the statements made in his "proof were true or false?" and he answered, "I do not."

But, assuming that this proof as it went in did tend to show that Coe Barnard had sworn falsely to a homestead entry of his own on the very day in which he made the proof for the claimant Watson charged as a perjury in the indictment here, towit, June 23, 1903, that evidence was admissible, and, indeed, need not have been limited by the Court as it was to affecting the credibility of the witness Stewart, but falls under the category of showing other similar offenses committed by the defendant Barnard at about the same time and relating to substantially the same subject matter as that specified in the

indictment, which was held admissible in the case of Gesner v. United States, and which class of evidence has been considered in Point IV of this brief. It is not to be charged against the Government that the Court may have made a mistake limiting the testimony too closely. If the testimony was admissible at all for any purpose, the fact that the Court limited it in a manner which was incorrect and too narrow should not prejudice the Government.

It will be noted in this connection that the counsel for the plaintiff in error, when the Court delivered its charge to the jury limiting the testimony in its effect to bearing on the credibility of the character witness Stewart, did not take any exception.

(See Trans. of Rec., page 135, quoted supra.)

We insist that a careful examination of the record in reference to this particular alleged error will show that it was as to a matter which did not go before the jury in such a way as to prejudice the defendant at all, and if it was erroneous may therefore be disregarded.

FINALLY.

As we have shown above, the Bill of Exceptions does not purport to contain all the evidence in the case, but does contain a statement that there was other testimony besides that contained in the bill "tending to corroborate "the other witnesses for the Government and tending to "show the facts stated in the indictment."

The defendant has been convicted by the verdict of a jury on abundant testimony and after a most careful and impartial charge of the Court to the jury. In such cases as this it has long been properly the custom and practice of the Courts to disregard all technical defects or errors, and indeed any alleged errors concerning which it does

not clearly appear that they militated heavily and wrongfully against a fair and impartial trial, and every reasonable presumption is always indulged in that the verdict was right and that exact and substantial justice has been done. The judgment should therefore be affirmed.

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